BANK MUAMALAT MALAYSIA BHD

v.

SOPHISTICATED PIPE INDUSTRY PRODUCTION SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
MOHD ZAWAWI SALLEH J
[SUIT NO: D4-22A-397-2009]
29 JULY 2011

BANKING: *Banker and customer - Duty of care - Plaintiff granted defendant loan to buy equipment - Defendant duty-bound under loan agreement to insure goods against loss or damage - Plaintiff insured equipment on defendant's behalf and expense - Equipment stolen from storage site - Insurers repudiated liability - Defendant sued plaintiff for loss of goods and loss of business profits - Relationship between parties - Whether plaintiff owed defendant duty of care in insuring equipment - Whether plaintiff assumed responsibility to defendant - Whether plaintiff had duty to advise defendant of terms and proviso of policy and precautions to take to avoid loss/damage to equipment - Whether plaintiff negligent or breached duty of care*

The instant case concerned the determination of the defendant's counterclaim against the plaintiff. The plaintiff had earlier obtained summary judgment on its claim against the defendant. The main issue in the counterclaim was whether the plaintiff owed a duty of care to the defendant to adequately insure goods belonging to the defendant and to advise and alert the defendant of the terms and proviso of a Takaful burglary insurance policy that the plaintiff had taken out on the defendant's behalf. The plaintiff had granted the defendant various Islamic loan facilities, one of which was to purchase machinery and equipment ('the goods') for the expansion of the defendant's business. The goods, costing about USD 18.4m (about RM69.7m) were purchased and imported from Germany. As the defendant's new plant was not yet ready for the goods to be installed when they arrived, they were stored at an open site in four large metal containers secured by locks.

The plaintiff took out a Takaful burglary insurance policy from Syarikat Takaful Malaysia Berhad ('STMB') in respect of the goods, on the defendant's behalf and expense, for an insured sum of RM10.8m. Most of the goods stored in the containers were subsequently stolen. The loss was estimated at about RM49.4m.

A STMB repudiated liability on the grounds that (i) it had not been proven that the goods had actually existed in the four containers (ii) a proviso under the policy excluded coverage for goods stored in 'any yard, garden, outbuilding or other appurtenances' and (iii) the defendant had failed to take reasonable precautions to prevent
B the loss or damage.

The defendant contended that by taking out the said insurance on its goods, the plaintiff had assumed responsibility to the defendant and could not exculpate itself from the liability and loss incurred
C as a result of its negligent acts and omissions. The defendant contended that the plaintiff owed a duty of care which had been breached, wherein it (i) failed to take reasonable care in taking out the burglary policy (ii) underinsured the goods at RM10.8m despite knowing their value was about RM69.7m (iii) negligently
D accepted the terms of the policy which expressly excluded coverage for goods stored in the open and (iv) failed to alert or advise the defendant of the existence of such proviso and of the need to take reasonable precautions to prevent loss or damage. The defendant said that the plaintiff's negligence had caused
E STMB to repudiate liability and had adversely affected the defendant's business. In its counterclaim against the plaintiff, the defendant prayed, *inter alia*, for RM49.4m, being the value of the goods stolen, and for other amounts for loss of profits.

F The plaintiff denied that it had owed the defendant any duty of care or fiduciary duty when it took out the burglary policy. The plaintiff said that under the loan facilities agreement, the defendant was duty-bound to insure the goods against loss or damage and that if it failed to do so, it was lawful for, but not obligatory upon, the plaintiff to do so. The defendant was responsible for its own
G breach of the agreement in failing/neglecting to insure the goods. The plaintiff said it did not provide any advisory services to the defendant and there was no proximity of relationship between the parties that caused it to owe a duty of care to the defendant.

H **Held (dismissing the defendant's counterclaim with RM10,000 costs):**

(1) The defendant had failed to prove that the plaintiff had been negligent or that it owed a duty of care to the defendant
I when it insured the goods. (para 48)

(2) There was nothing to suggest that a 'special' or 'professional' relationship existed between the parties. The defendant was not paying the plaintiff to give advice on insurance policy which would then be relied or acted upon by the defendant. The plaintiff was merely a financier to the defendant and the relationship between the parties was one of creditor and debtor under which no fiduciary duty arose. (para 40)

(3) The plaintiff did not possess special skill or knowledge on financial advisory services or provide professional or quasi-professional services which gave rise to a duty of care. (paras 40 & 43)

(4) The defendant was not entitled to rely on the plaintiff in taking care of its interest because it breached its contractual duty to insure the goods. There was nothing that could be regarded as a voluntary assumption of responsibility by the plaintiff for the way in which it went about taking the insurance and there was nothing that involved the plaintiff into any kind of relationship with the defendant that required it to exercise appropriate care. The parties were not in a relationship of proximity. (para 41)

(5) The defendant had failed to prove actual loss in respect of the goods alleged to be stolen. Its claim for loss of profits was too remote and was not reasonably foreseeable. (paras 54 & 56)

Case(s) referred to:

Baker v. Kaye [1992] 2 NZLR 282 ***(refd)***

Bank Bumiputra Malaysia Bhd Kuala Terengganu v. Mae Perkayuan Sdn Bhd & Anor [1993] 2 CLJ 495 SC ***(refd)***

Bank Utama (Malaysia) Bhd v. Insan Budi Sdn Bhd [2009] 1 CLJ 221 CA ***(refd)***

Body Corporate 188529 v. North Shore City Council [2008] 3 NZLR 479 ***(refd)***

Boyd Knight v. Purdue [1999] 2 NZLR 278 ***(refd)***

Capro Industries Plc v. Dickman [1990] All ER 568 ***(refd)***

Commissioners of Customs & Excise v. Barclays Bank [2007] I AC 181 ***(refd)***

Danial KC Tan & Associates Sdn Bhd v. Progressive Insurance Sdn Bhd [2001] 6 CLJ 361 HC ***(refd)***

ESSO Petroleum v. Marden [1976] 2 All ER 5 ***(refd)***

Hedley Byrne & Co Ltd v. Heller & Partners [1963] 2 All ER 575 ***(refd)***

Henderson v. Merrett Sydicates Ltd [1994] 2 All ER 506 ***(refd)***

Kapfunde v. Abbey National plc and Another [1998] WL 104428 ***(refd)***

KGV & Associates Sdn Bhd v. The Co-operative Central Bank Ltd [2006] 4 CLJ 241 CA ***(refd)***

A *Kian Lup Construction v. Hongkong Bank Malaysia Bhd [2002] 7 CLJ 32 HC* ***(refd)***
PB Malaysia Sdn Bhd v. Samudra (M) Sdn Bhd [2008] 1 LNS 679 HC ***(refd)***
Ross v. Cauters [1980] Ch 287 ***(refd)***
B *Sara Frost v. James Finlay Bank Ltd [2002] EWCA Cir 667* ***(refd)***
Sime UEP Properties Bhd v. Woon Nyoke Lin [2002] 3 CLJ 719 CA ***(refd)***
Smith v. Eric Bush, Harris & Wyne Forest DC [1989] 2 All ER 514 ***(refd)***
Spring v. Guardian Assurance Plc and Others [1985] 2 AC 296 ***(refd)***
Sri Inai (Pulau Pinang) Sdn Bhd v. Yong Yit Swee & Ors [2002] 4 CLJ 776 CA ***(refd)***
C *Sri Minal Construction Sdn Bhd v. Hongkong Bank Malaysia Bhd [2007] 9 CLJ 579 HC* ***(refd)***
White and Another v. Jones and Others [1995] 2 AC 207 ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 114(g)

D

For the plaintiff - Irwan Ismail; M/s Albar & Partners
For the defendant - Puteri Shehnaz Majid; M/s Cheah Teh & Su

Reported by Ashok Kumar

E

JUDGMENT

Mohd Zawawi Salleh J:

F **Introduction**

[1] The principal question in this case is whether the plaintiff bank owed a duty of care to the defendant to adequately insure as well as to advice and alert the defendant of the terms and proviso of the Takaful burglary policy which the plaintiff took out on behalf of the defendant.

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[2] The relationship of plaintiff and defendant arose in the following manner:

H 2.1 The plaintiff bank granted the defendant various loan facilities to, *inter alia*, fund the purchase of machinery and equipment for the purpose of expanding the defendant's business of manufacturing stainless steel butt weld pipe fittings in Malaysia.

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2.2 The machinery and equipment were purchased and imported from Germany.

2.3 As they were Islamic loans, the defendant simultaneously executed a purchase agreement and a sale agreement whereby the machinery and equipment needed to put up the new plant was purchased by the plaintiff and then immediately sold back to the defendant, the price difference being the profit payable for the entire term of the loan.

2.4 The defendant simultaneously executed a Sale Agreement and Purchase Agreement both dated 2 Jun 2003, and when the defendant needed additional funding to purchase more machinery and equipment as well as to acquire property for its new plant, the defendant simultaneously executed another Sale Agreement and Purchase Agreement both dated 4 October 2004.

2.5 The total value of the machinery and equipment based on invoices/quotations is approximately USD18.4 million (or approximately RM69.7 million).

2.6 Due to unexpected delays by the local authorities for the necessary approvals for the construction of the defendant's new plant, the machinery and equipment which was imported from Germany could not be installed as and when they arrived (in three batches), and was stored at a site adjacent to the defendant's old premises in Kuala Selangor (belonging to one Kristalina Worldwide Sdn Bhd – "Kristalina's Premises") in four large metal containers secured by locks.

2.7 The plaintiff had taken up a Burglary Takaful Certificate No. 178222470/0/0 Syarikat Takaful Malaysia Berhad ("STMB") for a coverage period from 1 April 2006 to 31 July 2007 with a coverage sum of RM10,800,000 and later on another Burglary Takaful Certificate No. 410083027/0/0 for a coverage period from 19 February 2008 to 18 February 2009 with the same coverage sum of RM10,800,000, whereby the plaintiff was endorsed as a chargee and the defendant was endorsed as the participant.

2.8 The plaintiff had paid a total premium of RM137,657.77 to Takaful on behalf of the defendant as at 3 July 2006.

A 2.9 Most of the machinery and equipment stored in the four containers were subsequently stolen. The defendant lodged two police reports on 14 April 2008 and 22 April 2008. The plaintiff also lodged a police report on 25 April 2008. The value of the stolen items is USD15.4 million
B (approximately RM49.4 million).

2.10 The defendant accordingly made a claim with Takaful, but it was rejected on the following grounds:

C (i) there was allegedly no proof of the existence of the machinery and equipment kept in the four containers and therefore no theft could have occurred;

(ii) there was a proviso in the Takaful Certificate which excluded coverage for goods stored in "any yard,
D garden outbuilding or other appurtenances".

(iii) the defendant had purportedly failed to "take reasonable precautions to prevent loss or damage".

E **[3]** Rohana Yusuf J has earlier allowed the plaintiff's application for summary judgment against the defendant for the amount outstanding under the facilities. The defendant appealed against the judgment. The judgment is pending disposal before the Court of Appeal.

F **The Defendant's Case**

[4] It is the defendant's case that the plaintiff bank owed a duty of care to the defendant to adequately insure as well as to advise and alert the defendant of the terms and proviso of the Takaful
G burglary policy which the plaintiff took out on behalf of the defendant.

[5] The defendant asserted that in breach of the plaintiff's duty of care, the plaintiff:

H (i) failed to seek the defendant's consent or views regarding the proposed policy from Takaful;

(ii) unilaterally under-insured the machinery and equipment for only RM10.8 million when the plaintiff at all material times
I knew that the equipment was worth approximately RM69.7 million;

(iii) unilaterally agreed to accept the terms of the Takaful policy that, *inter alia*, prohibited the storage of the machinery and equipment in the open (eg, yard, garden, outbuilding or other appurtenances);

(iv) failed to alert and/or advise the defendant of the existence of such terms and proviso in the policy;

(v) failed to alert or advise the defendant that the Takaful policy required the defendant to take "reasonable precautions to prevent loss and damage" and that the location and manner in which the machinery and equipment was stored was/did not meet Takaful's condition requiring the defendant to take reasonable precautions; and

(vi) failed to extend a copy of the Takaful policy to the defendant.

[6] The defendant submitted that by reason of the plaintiff's negligence, the plaintiff had caused:

(i) Takaful to repudiate liability under the insurance policy; and

(ii) the defendant's production and sale of specialized pipes to be held back and eventually stalled given the fact that the plaintiff was fully aware that the defendant's entire project for expansion of its business here in Malaysia that whatever repayment of the facilities would have to come from sales and profits derived from the defendant's intended new plant.

[7] The defendant further submitted that if not for the plaintiff's negligence:

(i) the defendant would be entitled to recover the full amount of the loss suffered from the theft of its machinery and equipment; and

(ii) the defendant would have commenced production of its specialized pipes by June 2008 and earned profit before tax estimated to be the region of RM6,556,400 for 2008.

[8] Therefore, the defendant's claim against the plaintiff is as follows:

(i) RM 49.4 million being the value of the equipment stolen;

(ii) RM6,556,400 being lost of profits for the period 1 June 2008 – 31 December 2008;

A (iii) RM10,093,900 being loss of profits for the period 1 January 2009 – 31 December 2009; and

(iv) continuing loss of RM840,000 per month from 1 January 2010 till date of judgment;

B (v) interest on the above sums at 8% per annum from 1 June 2008 till date of judgment; and

(vi) interest on the above sums at 8% per annum from date of judgment till date of full realization.

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The Plaintiff's Case

[9] It is the plaintiff's case that the plaintiff did not own duty of care and fiduciary duty towards the defendant when it arranged and took out the Takaful Certificates over the machineries. Under D the terms of the facilities, it was the defendant's contractual duty to insure the equipments against loss and damage with any Islamic Insurance Company acceptable to the plaintiff. It is also provided that in the event the defendant fails to effect any of such E insurance, it is lawful but not obligatory upon the plaintiff to effect the insurance.

[10] It is the plaintiff's case that the defendant had breached the terms of the facilities for not insuring the equipments despite the advice made by the plaintiff to the defendant.

F

[11] There was no proximity of relationship between the plaintiff and the defendant as the plaintiff did not provide any advisory services to the defendant and it is unreasonable that the plaintiff should own the defendant duty of care. Since no such duty exists, G there can be no issue of whether the plaintiff was negligent in insuring the equipments and thus cannot be held liable for the alleged loss suffered by the defendant.

[12] In essence, the plaintiff submitted that it was under no H contractual duty to insure the equipments as such duty lies with the defendant. It is therefore unfair and unreasonable to impose a duty of care on the part of the plaintiff and to allow claim for economic loss when it was the defendant who had breached the facilities agreements by failing and neglecting to insure the I equipments in accordance with the terms of facilities. To allow it would be against the public policy.

Issues For Determination

[13] The issues in this case, in order in which I propose to deal with them to the extent necessary for the disposition of the case, may be summarized as follows:

(a) whether liability in tort and contract can exist concurrently or alternatively;

(b) whether in taking out the insurance policy in respect of the defendant's machinery and equipment, the plaintiff had voluntarily assumed the responsibility on behalf of the defendant and therefore owed the defendant a duty to exercise reasonable care and skill in doing so; and

(c) whether the plaintiff owed a duty of care to the defendant to adequately insure as well as to advise and alert the defendant of the terms and proviso of the insurance policy taken out by the plaintiff with Takaful Malaysia and if so, whether the plaintiff breached such duty of care.

Court's Findings

Issue (a)

[14] The plaintiff submitted that there was no contractual duty on its part to insure the machineries and equipments and that it had merely exercised its rights under the agreement to insure the same.

[15] It is settled law that liability in tort and contract can exist concurrently or alternatively. The turning point on this issue is the case of *Hedley Byrne & Co. Ltd v. Heller & Partners* [1963] 2 All ER 575. Although the claim failed on the facts, the court recognized in principle that there could be a claim in tort even there was a contractual remedy available. This was followed by *ESSO Petroleum v. Marden* [1976] 2 All ER 5 at 15 in which Lord Denning MR held that negligence in pre-contractual statements could also attract liability on the ground that: in the case of a professional man, the duty to use reasonable care arises not only in contract, but is also imposed apart from contract, and is therefore actionable in tort.

[16] In English law, this trend continued. There has been general acceptance of concurrent claims in tort and contract where the facts of the case justify the protection of economic interests by

finding duties in tort and contract. The leading case in this development was *Henderson v. Merrett Sydicates Ltd* [1994] 2 All ER 506, where it was held that where there is an assumption of responsibility and reliance on professional or quasi – professional services there is a tortious duty of care irrespective of a simultaneous contractual relationship. Where the duty of care is breached, the plaintiff has a choice to sue in contract or tort. The general rule will be that the plaintiff can sue in tort unless he or she has contracted out of tortious liability.

[17] This proposition law has been accepted in Malaysia. In *Bank Utama (Malaysia) Bhd v. Insan Budi Sdn Bhd* [2009] 1 CLJ 221, the Court of Appeal had this to say:

> [58] The learned trial judge, after having considered and analysed the Commonwealth cases cited by counsel for the defendant and plaintiff on this point, made the following decision:
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> *Considering all these authorities I am of the view that the liabilities both in tort and contract can exist concurrently or alternatively.*
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> [59] One of the cases cited by learned counsel in support of his contention that the defendant was liable concurrently in contract and in negligence is the decision of the High Court of Wellington, New Zealand in *Rowlands v. Collow* [1992] 1 NZLR 178. In that case the plaintiff sought to advance claims against the first defendant both in contract and tort, alleging negligence in relation to both design of the driveway and adequacy of his supervision of its construction. The first defendant argued that his contractual obligation was to design the driveway, and that he had not entered into any contractual obligation to supervise the work. As a consequence, he argued he could not be liable in tort for faulty supervision. Thomas J held, *inter alia* that a *person performing professional services may be liable concurrently in contract and in negligence unless the terms of the contract precluded the tortious liability.*
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> …
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> [61] *In Singapore the court also held that in the absence of express contractual stipulations, concurrent liabilities in both contract and tort can exist.* See *Guan Meng Hardware & Engineering Pte Ltd v. Chong Yeo & Partners* [1966] 2 SLR 621.
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> …
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> [63] *Having carefully considered the authorities cited and the judgment of the learned trial judge we are satisfied that the learned trial judge has not erred on this point.* (emphasis added)

[18] Based on the authorities cited above, the plaintiff's contention that no duty of care exists merely because the terms of the facilities do not impose any contractual obligation on the part of the plaintiff to insure the equipments with Takaful is untenable in law. While the work undertaken by contract would provide guidance as to the nature of the relationship, the nature and scope of the duty of care that is asserted as the foundation of the tortious liability must not depend on specific obligations or duties created by the express terms of the contract.

Issues (b) And (c)

[19] The defendant submitted that having taken out insurance on behalf of the defendant in respect of the machineries and equipments belonging to the defendant, the plaintiff assumed responsibility to the defendant and cannot absolve or exculpate itself from any liability and the loss incurred as a result of its negligent acts and omissions.

[20] In support of his submissions, the defendant cited the case of *Sri Inai (Pulau Pinang) Sdn. Bhd v. Yong Yit Swee & Ors* [2002] 4 CLJ 776 where Gopal Sri Ram JCA (as His Lordship then was) had this to say:

> At present, the law of tort imposes a duty of care on a defendant who assumes responsibility to perform professional or quasi-professional services for a plaintiff who relies on those services. It is important to emphasise that in such cases, the relationship between the parties is itself sufficient, without more, to give rise to a duty on the part of the defendant (who provides the services) to exercise reasonable skill and care in doing so … It may also be added for good measure that the assumption of responsibility and the factum of reliance may be either express or may be reasonably inferred from the circumstances of the particular case …

(See also *KGV & Associates Sdn Bhd v. The Co-operative Central Bank Ltd* [2006] 4 CLJ 241).

[21] Now, the idea of voluntary assumption of responsibility outside a contract made its first appearance in English law in connection with claims for the compensation of economic loss and in the seminal decision of the House of Lords in *Hedley Byrne v. Heller (supra)*, where it was decided that a bank can be liable for a negligent information supplied without consideration to a regular client. In the case of *Henderson v. Merrett Syndicate Ltd* [1995]

(supra), Lord Goff, in looking for the principle which underlay the decision in *Hedley Byrne*, referred to passages in the speeches to Lord Morries and Lord Devlin in that case including a passage in the speech of Lord Devlin where he considered the sort of relationship which gave rise to a responsibility towards those who act upon information or advice, and thus created a duty of care towards the person so acting. Lord Devlin had said:

> I do not understand any of your Lordships to hold that it is a responsibility imposed by law upon certain types of persons or in certain sorts of situations. It is a responsibility that is voluntarily accepted or undertaken, either generally where a general relationship, such as that of solicitor and client or banker and customer, is created, or specifically in relation to a particular transaction.

[22] Lord Goff added in *Henderson*:

> From these statements, and from their application in Hedley Byrne, we can derive some understanding of the breadth of the principle underlying the case. We can see that it rests upon a relationship between the parties, which may be general or specific to the particular transaction, and which may or may not be contractual in nature. All of their Lordships spoke in terms of one party having assumed or undertaken a responsibility towards the other.

[23] So, the tortious liability under *Hedley Byrne* rests upon a relationship between the parties and which may or may not contractual in nature. One party must assume or undertake a responsibility towards the other. One party must have a "special skill" which he undertakes to "apply for the assistance of another who relies upon such skill". *Hedley Byrne* was concerned with the provisions of information and advice but in principle might have also included the performance of other services. However, there is still the need for reliance upon that advice or service to establish a cause of action.

[24] In *Spring v. Guardian Assurance Plc and others* [1985] 2 AC 296, Lord Keith of Kinkel had this to say:

> I wish also to refer to the nature of the 'special skill' to which Lord Marris referred in his statement of principle. It is, I consider, clear from the facts of *Hedley Byrne* itself that the expression 'special skill' is to be understood in a broad sense, certainly broad enough to embrace special knowledge. Furthermore Lord Morris himself, when speaking of the provision of a

statement in the form of information or advice, referred to the defendant's judgment or skill or ability to make careful inquiry, from which it appears that the principle may apply in a case in which the defendant has access to information and fails to exercise due care (and skill, to the extent that this is relevant) in drawing on that information for the purpose of communicating it to other.

[25] In the light of the above, the essential elements, therefore, were an assumption of responsibility coupled with reliance on the party who assumed that responsibility.

[26] Authorities abound in support of the above proposition. Illustrations are found in:

(a) *Baker v. Kaye* [1992] 2 NZLR 282.

The High Court held that a medical practitioner retained by a company to carry out pre-employment medical assessments of its prospective employees owes a duty of care to those whom he assesses in carrying out his assessment and in reporting his conclusion. The defendant medical practitioner was, therefore, under a duty to the plaintiff to take reasonable care in carrying out the medical assessment in connection with the job offer, and in making a judgment as to the plaintiff's suitability for employment by reference to the employers' requirements. It was held to be a duty of care that fulfilled all the legal requirements: namely, foresee ability of economic loss, the necessary degree of proximity between the parties and the proviso that it should be just, fair and reasonable in all the circumstances for a duty to be imposed. Not only was it clear that economic loss was a foreseeable consequence of a breach of the duty, but there was also sufficient proximity between the parties to give rise to a duty of care, as the defendant knew that the plaintiff's employment by the company depended solely on the assessment and that to make a non-recommendation could have serious financial consequences. Finally, it was just, fair and reasonable for such a duty to be imposed; there was no conflict between the proper discharge of the defendant's contractual duty to the prospective employers and any duty to the plaintiff, and the plaintiff was dependent upon the medical assessment made by the defendant. The latter was, however, found, not liable, as it was not shown that he had breached his duty of care in his assessment of the plaintiff's fitness for the job.

(b) In *Kapfunde v. Abbey National plc and another* [1998] WL 104428 (CA (civ Div)).

The Court of Appeal, in considering the same question, ie, the question whether in assessing the appellant's suitability for employment by Abbey National Plc, a medical practitioner, employed by Abbey National for that purpose, owed her a duty of care, reached a negative conclusion. The court held that a duty of care will generally be owed to the person to whom a statement is made and who relies on it. In the case of a bank reference or medical report, this is normally the person who asks for it or commissions it. A reference by an employer, however, is likely to be regarded as provided to the former employee, who is the subject of the reference, for his use 'as a passport to future employment', rather than as a service to any particular prospective new employer. The court disapproved of the judge's conclusion as to the existence of a duty of care in *Baker v. Kaye (supra)*. The doctor's advice is given to the employer or insurer and not to the applicant for a job, who is a patient only in the sense that he is the subject of the examination and advice. The doctor is, therefore, taken to assume responsibility for his advice only to the employer or insurer who commissioned it, and not to the patient.

(c) *White and another v. Jones and others* [1995] 2 AC 207.

This is a case where a solicitor was found liable to the intended beneficiaries of his client, the testator, who died before the solicitor came round to drawing up a will under instructions to confer a benefit on them. The House of Lords (Lord Keith and Lord Mustill dissenting) held that where a solicitor accepted instructions to draw up a will and a result of his negligence an intended beneficiary under the will was deprived of a legacy, the solicitor was liable for the loss of the legacy. Lord Goff and Lord Nolan based their decision on extending the assumption of responsibility by the solicitor towards his client in law to an intended beneficiary. But they made it clear that this assumption of responsibility existed only if the loss of the beneficiary was foreseeable to the solicitor, and if the circumstances of the situation were that there was no confidential or fiduciary relationship between the parties, and neither the testator nor his estate had a remedy against the solicitor. Tort liability was appropriate in such

circumstances only because otherwise an injustice would occur, as a result of a lacuna in the law and there would be no remedy for the loss caused by the solicitor's negligence to the beneficiary. Lord Browne-Wilkinson and Lord Nolan held that the principle of assumption of responsibility should be extended to a solicitor who accepted instructions to draw up a will, holding him to be in a special relationship with those intended to benefit under it.

(d) *Boyd Knight v. Purdue* [1999] 2 NZLR 278 (CA).

This case involved a claim against auditors whom had prepared a report for inclusion in a prospectus issued to persons who were considering the investment of funds with a company. The report stated that the company's financial statements gave a true and fair view of the company's affairs. The auditors were sued in negligence by investors who had taken up shares in the company. The Court of Appeal said at [57]:

> A broader approach is permissible where it is proved or, as here, admitted that if the accounts had been accurate no prospectus would have been issued and no investment could then have been made – in other words, that "but for" the inaccuracy there could have been no loss to a new investor. But even in such circumstances the limited scope of the duty of care must be remembered. In such a case there must at least be a reliance on the basic features of the financial statements – the results they show (profit level, balance of shareholders' funds and, perhaps, the current assets/liability ratio). There must be evidence that these features were considered by the plaintiff and, taken as a whole, relied upon. The investor must prove that he or she paid attention to the content of the financial statements and noted these basic features – that it was not simply a case of glancing at the accounts, but in reality failing to consider them and, instead, relying in a general way on the fact that the investment offer was being made pursuant to a prospectus and that the Regulations put some safeguards in place.

(e) *Body Corporate 188529 v. North Shore City Council* [2008] 3 NZLR 479 (HC) at 221.

> In that case one of the defendants sued by the unit owner in a leaky building was a designer who had inspected five of the units in the complex and provided a certificate of practical completion to the developer's solicitors. The

A certificate was required to enable funds to be released to the developer. The unit owners alleged *inter alia* that the designer had breached a duty to exercise reasonable care in inspecting the units and in providing the certificate of practical completion. The breach was alleged to have arisen from the designer's failure to identify and correct deficiencies in the plans, specifications, workmanship and construction methods employed on behalf of the developer. As a result, the plaintiffs alleged that the designer had issued his certificate of practical completion negligently. Only one of the unit owners, a Mr Devlin, had received a copy of the designer's certificate of completion before he completed the purchase of his unit. The claim against the designer failed at first instance for the following reasons:

[552] Mr Devlin does not say, in explicit terms, that he relied upon the practical completion certificate to complete his acquisition of the unit. I hold that the proximity between Mr Devlin and the designer was insufficient to give rise to a duty and, in any event, that any loss suffered would be too remote to be claimable.

[553] Unlike the Council's obligations to inspect and to certify code compliance, there can be no community expectation on a designer to certify practical completion. Thus, it is necessary to prove actual reliance in order to establish that any loss has been suffered as a result of negligence of the designer in these circumstances.

[554] Accordingly, the claims against the designer based on negligent preparation of certificates of practical completion fail. It is unnecessary for me to determine whether the certificates were or were not prepared and signed negligently.

[27] Reverting back to the instant case, the defendant submitted that the plaintiff failed to take reasonable care in taking out the Takaful burglary policy on behalf of the respondent. According to the defendant, the plaintiff unilaterally under-insured the machineries/equipments for only RM10.8 million when the plaintiff knew at all material times the value of the machineries/equipments because the plaintiff was the financier and the details were contained in the First Schedule of the 2 Equipment Sale Agreements dated 2 June 2003 and 4 October 2004.

[28] Further, according to the defendant, one of Takaful's grounds for repudiating liability on the insurance claim was that there was a proviso that excluded liability for burglary in respect

of any item stored in "any yard, garden, outbuilding, or other appurtenances" (see proviso (e)). The plaintiff knew at all material times that the machineries and equipments were stored in four containers and left at Kristalina's Premises. It is clear that the plaintiff was negligent when it accepted the terms of an insurance policy which expressly excluded liability for items stored out in the open yard, and more importantly, failed to subsequently advice the defendant of such a term.

[29] The fact that the plaintiff took out the Takaful burglary policy on behalf of the defendant could not be disputed. DW1 admitted under cross-examination that all expenses that were incurred in getting the insurance policy were charged to the defendant's account. On top of charging the premium, the plaintiff had also charged a 15% administration fee when the plaintiff took out the first burglary policy with Takaful back in 2006.

[30] In countering the defendant's argument, the plaintiff submitted that the defendant was aware of the fact that the plaintiff had taken up the Takaful certificates as the defendant was informed that the sum of RM137,657.77 was utilized to pay STMB for the insurance coverage. However, the defendant had never objected to the payment made for the insurance coverage nor that the defendant had ever objected to any term of the certificate including the coverage sum.

[31] In support of his submission, reliance was placed on the case of *Sara Frost v. James Finlay Bank Ltd* [2002] EWCA Cir. 667, the fact of the case is that the borrower sued the bank for breach of duty of care in relation to the change of insurer of the borrower's property being one of the condition imposed under the loan agreement. It was contended that the bank had imposed and carried out on behalf of the borrower a requirement to change the insurer and thereby had tendered and performed the skilled services of an insurance broker and undertook the corresponding duties. In holding that the bank owed no duty of care, the Vice-Chancellor said in para. 125:

> The requirement, if any, was imposed by the Bank for its own protection as lender. That was the only interest in the property that it had. It was not involving itself in the affairs of Mrs Cameron in any capacity except that of the secured lender.

[32] In para. 127, it was held that:

> The fact the arrangement of insurance cover is a function of an insurance broker does not lead to the conclusion that because the bank made the administrative arrangements by instructing the broker it thereby undertook all the duties of an insurance broker … But, as a lending bank, it owed no duty of care to Mrs Cameron; hence the attempt to clothe the bank with the functions and duties of an insurance broker. The attempt is understandable, but in my view, it fails …

[33] There is no duty imposed under the terms of the facilities for the plaintiff to provide the Takaful Certificates to the defendant nor there is a duty for the plaintiff to advise on the terms of the certificates. It is for STMB as the insurer to provide the Takaful Certificates to the defendant as the participant named under the certificates.

[34] Based on the abovesaid facts and authorities it is submitted that the plaintiff did not owe duty of care and fiduciary duty towards the defendant when it arranged and took out the Takaful Certificates over the equipments. There was no proximity of relationship between the plaintiff and the defendant as the plaintiff did not provide any advisory services to the defendant and it is unreasonable that the plaintiff should owe the defendant duty of care.

[35] To my mind, there was force in the plaintiff submission. According to the evidence of PWI, the coverage sum of RM10,800,000 was based on the insurable quoted by STMB. Notwithstanding the original full value of the equipment is higher, there was no evidence led by the defendant to show what is the true insurable value of the said equipments nor that the defendant tendered any evidence to show that market value of the equipment at the material time. Even the interest covered under the defendant's own policy issued by Allianz Malaysia was less than the interest covered under the Takaful.

[36] It is pertinent to note that in the case of liability in tort for pure economic loss in accordance with the principle in *Hedley Byrne*, the terms of any relevant contract between the parties or authorised by a party will be relevant to the existence, scope and extent of a duty of care. For example, in the case of *Henderson v. Merrett Syndicates Ltd (supra)* at 521 per Lord Goff, it was suggested that where there is a contract or a case equivalent to a contract, an objective test can be applied when asking the

question whether responsibility should have been assumed by the defendant to the plaintiff. In other words, is the relationship one which is sufficiently 'special' or 'proximate'? Evidence of a contract would facilitate such a finding.

[37] In the case of liability in tort for pure economic loss in accordance with the principle in *Hedley Byrne*, it is necessary to look at the relationship and dealings between the parties in order to ascertain the assumption of responsibility coupled with reliance so as to give rise to tortious issue.

[38] In this instant case, "Other Conditions" of the letter of offer dated 11 April 2003 provides as follows:

OTHER CONDITIONS

During the duration of the Financing facilities, the customer shall:

1. Adequately insure the customer's assets against all insurance company acceptable to the Bank. The policy is to be assigned to the Bank as chargee. Certified copies of the policies are to be furnished to the Bank;

[39] Clause 19 of the Sale Agreement dated 2 June 2003 provides as follows:

19. INSURANCE

19.1 Insurance and Endorsement of the Bank's Interest

(a) The Customer shall (if required by the Bank) insure the Machinery and/or the land on which the Machinery is situated and all machinery plant equipment on its properties and assets for a sum satisfactory to the Bank against loss or damage by fire, lighting, tempest, flood, riot, civil commotion, strike, malicious acts and against such other insurable risks as the Bank may from time to time think expedient and shall keep the same so insured throughout the duration of this Agreement to their full insurable value to the satisfaction of the Bank with an Islamic insurance company or companies acceptable to the Bank and shall arrange with such insurance company or companies to have the interest of the Bank as loss payee endorsed on the insurance policy or policies effected.

A (b) The Customer will pay all premia for the insurances effected herein on the first day on which the same ought to be paid and, if required by the Bank, deliver to the Bank on demand the receipt for every premium payable under such policy or policies and promptly supply to the Bank such information regarding the
B insurances as the Bank may from time to time request.

(c) If the Customer shall fail to effect, maintain or renew the insurance referred to herein above, it shall be lawful for but not obligatory upon the Bank, at the
C cost and expense of the Customer, to effect, maintain or renew any such insurance as the Bank may think fit.

[40] Looking at the above provisions, to my mind, there is nothing
D to suggest 'special' or 'professional' relationship exists between the parties. The defendant was not paying the plaintiff to give advice on insurance policy which would then be relied or acted upon by the defendant. The plaintiff was merely a financier to the defendant by providing the banking facilities. Indeed, under the
E terms of the facilities, it was the defendant's contractual duty to insure the machineries/equipments against the loss and damage with any Islamic banking insurance company acceptable to the plaintiff. It also provides that in the event the defendant fails to effect any of such insurance, it is lawful but not obligatory upon
F the plaintiff to effect the insurance. It is clear that the relationship is one of creditor and debtor under which no fiduciary duty arises as it was not the contract to provide financial advisory services. The plaintiff does not possess special skill or knowledge on financial advisory services. (See *Kian Lup Construction v. Hongkong*
G *Bank Malaysia Bhd* [2002] 7 CLJ 32; *Sri Minal Construction Sdn Bhd v. Hongkong Bank Malaysia Bhd* [2007] 9 CLJ 579).

[41] In the circumstances of this instant case, the defendant was not entitled to rely on the plaintiff in taking care of their interest
H because the defendant had breached the facilities agreements by failing and neglecting to insure the equipments in accordance with the terms of facilities. There was nothing that could be regarded as a voluntary assumption of responsibility by the plaintiff for the way in which it would go about taking the insurance and there
I was nothing that involved the plaintiff into any kind of relationship with the defendant that required it to exercise appropriate care.

The parties were not in a relationship of proximity and it would not be fair, just and reasonable to hold plaintiff owed a duty of care to the defendant.

[42] It is pertinent to note that the decision in the case of *Hedley Byrne* recognized the tortious liability where there was a special relationship between the provider of information and the person relying on that information. The assumption of responsibility by a professional or quasi-professional provider of services gave rise to a duty of care and skill in the exercise of the professional function. In subsequent cases it was established that the relationship did not to be gratuitous, the principle could be applied in contractual as well non-contractual situations, and to quasi-professional as well as professional providers. Thus, *Hedley Byrne* was applied to solicitors (*Ross v. Cauters* [1980] Ch 287], surveyors and valuers (*Smith v. Eric Bush, Harris & Wyne Forest DC* [1989] 2 All ER 514], accountants (*Capro Industries Plc v. Dickman* [1990] All ER 568; and insurance brokers [1998] 2 Lloyds Rep 431), bank officer who was carrying out his professional duty (*Bank Utama (Malaysia) Bhd v. Insan Budi Sdn Bhd (supra)*).

[43] The critical question to be asked is this: Could the plaintiff be said to provide professional or quasi-professional services when it took out the takaful burglary policy on behalf of the defendant. On examination of the facts and circumstances of this instant case, this court is of the considered opinion that the defendant did not provide a professional or quasi-professional services which gave rise to duty of care. Lord Morris (with whom Lord Hudson agreed stated the principle in *Hedley Byrne* as follows:

> (I)f in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows and should know, will place reliance upon it, then a duty of care will arise.

[44] The tests for imposing a duty of care were reviewed by the House of Lord in *Commissioners of Customs & Excise v. Barclays Bank* [2007] IAC 181, a case which arose in a non-contractual context (liability for failing to implement freezing order). The conclusion of their Lordships was that all of the tests operated at a high level of abstraction and accordingly the detail of each scenario had to be grappled with. Lord Bingham said at p. 8:

> … it seems to me that the outcomes (or majority outcomes) of the leading cases cited above are in every or almost every instance sensible and just, irrespective of the test applied to achieve that outcome. This is not to disparage the value of and need for a test of liability in tortuous negligence, which any law of tort must propound if it is not to become a morass of single instances. But it does in my opinion concentrate attention on the detailed circumstances of the particular case and the particular relationship between the parties in the context of their legal and factual situation as a whole.

[45] Similarly Lord Hoffmann emphasized the need for the evolution of "lower level principles" as a more useful guide than "high abstractions":

> 35. There is a tendency, which has been remarked upon by many judges, for phrases like 'proximate', 'fair, just and reasonable' and 'assumption of responsibility' to be used as slogans rather than practical guides to whether a duty should exist or not. These phrases are often illuminating but discrimination is needed to identify the factual situations in which they provide useful guidance. For example, in a case in which A provides information to C which he knows will be relied upon by D, it is useful to ask whether A assumed responsibility to D. *Hedley Byrne & Co Ltd v. Heller & Partners Ltd* [1964] AC 465: *Smith v. Eric S Bush* [1990] 1 AC 831. Likewise, in a case in which A provides information on behalf of B to C for the purpose of being relied upon by C, it is useful to ask whether A assumed responsibility to C for the information or was only discharging his duty to B: *Williams v. Natural Life Health Foods Ltd* [1998] AC 830. Or in a case in which A provided information to B for the purpose of enabling him to make one kind of decision, it may be useful to ask whether he assumed responsibility for its use for a different kind of decision: *Caparo Industries plc v. Dickman* [1990] 2 AC 605. In these cases in which the loss has been caused by the claimant's reliance on information provided by the defendant, it is critical to decide whether the defendant (rather than someone else) assumed responsibility for the accuracy of the information to the claimant (rather than to someone else) or for its use by the claimant for one purpose (rather than another). The answer does not depend upon what the defendant intended but, as in the case of contractual liability, upon what would reasonably be inferred from his conduct against the background of all the circumstances of the case. The purpose of the inquiry is to establish whether there was, in relation to the loss in question, the necessary relationship (or 'proximity') between the parties and, as Lord Goff of Chieveley pointed out in *Henderson v. Merrett Syndicates Ltd* [1995] 2 AC 145, 181 the exercise of that relationship and the

> foreseeability of economic loss will make it unnecessary to undertake any further inquiry into whether it would be fair, just and reasonable to impose liability. In truth, the case is one in which, but for the alleged absence of the necessary relationship, there would be no dispute that a duty to take care existed and the relationship is what makes it fair, just and reasonable to impose the duty.
>
> It is equally true to say that a sufficient relationship will be held to exist when it is fair, just and reasonable to do so. Because the question of whether a defendant has assumed responsibility is a legal inference to be drawn from his conduct against the background of all the circumstances of the case, it is by no means a simple question of fact. Questions of fairness and policy will enter into the decision and it may be more useful to try to identify these questions than simply to bandy terms like 'assumption of responsibility' and 'fair, just and reasonable'. In *Morgan Crucible Co plc v. Hill Samuel & Co Ltd* [1991] Ch 295, 300-303 I tried to identify some of these considerations in order to encourage the evolution of lower-level principles which could be more useful than the high abstractions commonly used in such debates.

[46] In the final analysis, the existence of duty of care is a question of law and depends on mixed consideration of logic, common sense, justice, policy and precedent.

[47] As regards to the terms and provisos relied on by STMB in rejecting the claim under the Takaful, the court agreed with the submissions of the defendant that it is for a different forum to decide. As admitted by PW1, the defendant did not commence any action against STMB for the insurances claim though the defendant is entitled to do so as the participant named under the certificate. The defendant, therefore, had failed to mitigate the loss.

[48] All told, the court is of the considered opinion that the defendant had failed to prove that the plaintiff bank owed a duty of care to defendant when the plaintiff insured the equipment. The defendant had also failed to prove that the plaintiff had been negligent.

[49] If I am wrong in deciding the issue of liability, I will now discuss the loss claimed by the defendant.

[50] Based on evidence available, in the court considered opinion, the defendant had failed to prove the actual loss. In *PB Malaysia Sdn Bhd v. Samudra (M) Sdn Bhd* [2009] 7 MLJ 681, the court held at pp. 697-698:

A The law is clear that the person seeking a claim for damages has the burden of proving both the facts and the amount of damages before he can recover them …

… Damages must be proved with real or factual evidence (as opposed to mere particulars, summaries, estimations or general
B conclusions) in order for a party to recover them.

[51] With regards to the claim for the value of the equipments allegedly stolen, the defendant attempts to rely on the purchase and shipping documents. From the evidence, particularly the
C shipping documents, the equipments were actually shipped in seven containers. Now, it is claimed by the defendant that the equipments had been kept in four containers parked at the land next to the defendant's premises. There was no evidence tendered to show particulars of the equipments exactly kept inside the
D containers, for example packing list or inventories.

[52] PW1 agreed that he was not personally involved in the reloading works of the equipments into the four containers as it was done by one Mr Dirk te Heesen who also kept the keys until
E the alleged theft was discovered. PW1 also agreed that he had never seen the equipments inside the containers.

[53] PW2 claimed that he was involved in the reloading works of the equipments into the four containers and had seen the equipments inside the containers. However, he was not sure when
F asked during the cross-examination particularly on the date and how the equipments were said to be transferred into the four containers. His claim also contradicts the contents of his own letter dated 17 August 2008 to STMB's adjuster in respect of the Takaful claim (see p. 111 to 113 of bundle B4). In that letter,
G only Mr Dick te Heesen's name was mentioned as a person who had last seen the equipments. The containers were also sealed by Mr Dick te Heesen in 2005 and were never opened after that as the keys were kept by him. Further, Mr Dirk te Heesen was not called as a witness and therefore adverse inference should be
H invoked against the defendant under 114(g) of the Evidence Act. The presumption from withholding under s. 114(g) may be necessary in the interest of fair trial and justice as no party should profit from withholding or suppressing best or material evidence which could throw light on the facts in issue in a trial. An adverse
I inference can then be drawn against a party that keeps his opponent out of possession of such evidence.

[54] There was also no evidence led by the defendant as to the market value of the equipments considering that the equipments had been purchased way back in 2006 and 2007. Therefore, on balance of probabilities, the defendant had failed to prove the actual loss in respect of the value of the equipments alleged to be stolen.

[55] On the issue of the defendant's claim for loss of profits from 1 June 2008 until 31 December 2008 and from 1 January 2009 to 31 December 2009 as well as continuing loss from 1 January 2010, it is evidently clear that the business of the defendant is much dependent on the completion of the construction of its factory. According to PW1 the construction was only 45% completed but no evidence to support the claim tendered into court. PW1 also agreed that the construction had been delayed as originally, the construction was supposed to be completed in 2005. Further, there was no evidence led that the defendant is able to ensure the completion of the construction of the factory to be used for its business.

[56] Therefore, the defendant's claim for loss of profits from 1 June 2008 is too remote and not reasonably foreseeable. Even if the equipment were not stolen, the defendant still cannot commence the operation of its factory and start its business at that point of time.

[57] In *Kian Lup Construction v. Hong Kong Bank Malaysia Bhd* as cited earlier, at p. 55, it was held that:

> … The plaintiff must prove that as a result of the breach of duty by the defendant, the plaintiff has suffered damages. In the case of *Cork v. Maclean Ltd.* [1952] All ER 402 (at p. 407), Lord Denning LJ has said:
>
> > Subject to the question of remoteness, causation is, I think, a question of fact. If you can say that the damage would not have happened but for a particular fault, then that fault is in fact a cause of the damage, but if can say that the damage would have happened just the same, fault or no fault, then the fault is not the cause of the damage.

[58] In order to prove the loss of profit, the defendant has also attempted to rely on the purchase orders issued in 2004 (see pp. 6 to 23 of bundle C-P9) and the forecast of the estimated profits and loss account prepared by PW1 (see p. 28 of bundle C - P10).

[59] With regards to P9, under cross-examination, PW1 agreed that there was no supporting document to show that the intended purchasers were still interested with the purchase as almost five years have lapsed since the issuance of the purchase orders.

[60] With regards to P10, the forecast is only an estimation which is nothing more than a mere speculation, conjecture or projection which is not sufficient to prove loss of profits. The defendant had failed to prove the actual loss as no audited accounts had been tendered to support the claim. There was no supporting evidence to show how the figures in the said estimation are arrived at. There was also no evidence shown as to the prospect of achieving the future projected income as claimed.

[61] In *Sime UEP Properties Bhd v. Woon Nyoke Lin* [2002] 3 CLJ 719, at p. 740, the Court of Appeal held that:

> … in order to succeed in claims for damages for loss of profit one must establish the actual losses one would have suffered as a result of the breach. A projection as in this case is not sufficient to establish the would be losses of profit. A venture into a business would not necessarily mean that one can make a profit out of it because there are instances where people suffer losses. Not all businesses end up with a profit. It is clear to us that the respondent failed to establish the expected losses as a result of the breach …

[62] In *Danial KC Tan & Associates Sdn Bhd v. Progressive Insurance Sdn Bhd* [2001] 6 CLJ 361, it was held that in the light of the decision of the then Supreme Court in *Bank Bumiputra Malaysia Bhd Kuala Terengganu v. Mae Perkayuan Sdn Bhd & Anor* [1993] 2 CLJ 495, the plaintiff's claim for future projected loss is too remote and untenable.

Conclusion

[63] In the upshot, the defendant's counter claim is dismissed with costs. The cost is fixed in the sum of RM10,000.